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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-693

HONORABLE HUBERT L. WILL, Judge, United States District Court for the Northern District of Illinois,
Petitioner,

v.

CALVERT FIRE INSURANCE COMPANY,
Respondent,

and

AMERICAN MUTUAL REINSURANCE COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE PETITIONER

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Opinion Below

The opinion of the court of appeals (Appendix 1 to the Petition for Certiorari) is reported at 560 F.2d 792.

Jurisdiction

The writ of mandamus was issued by the court of appeals on August 15, 1977. The petition for certiorari was filed on November 14, 1977. Certiorari was granted on January 9, 1978. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the district courts of the United States have been deprived by this Court's decision in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), of all discretion to stay proceedings pending before them in the interest of judicial economy and to avoid duplicative litigation.

2. Whether the United States district courts have a clear legal duty enforceable by mandamus "immediately" to try cases before them despite the fact that prior-commenced litigation between the same parties raising the same legal and factual issues is proceeding in a state court in a manner that may well render the entire federal case moot.

3. Whether this Court's opinion in *Colorado River* entitles a litigant effectively to compel a United States district judge by writ of mandamus to engage in a race with a state court to decide identical legal issues pending in both courts between the same parties, when the judge reasonably believes such a race to be unnecessary and wasteful.

Statutory Provision Involved

All Writs Act, 28 U.S.C. § 1651(a):

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

The Facts

The recitation of facts is selected from the opinion below substantially in that court's own language.[1]

Calvert Fire Insurance Company writes property and casualty insurance. Calvert's antagonist, American Mutual Reinsurance Company, engages in the business of reinsurance. For many years American Mutual has operated a reinsurance pool known as the "Multiple Line Pool."

Calvert [became] a member of the pool. Prior to its entrance in early 1974, there were discussions between Calvert and American Mutual officials. In April 1974, Calvert, having found itself pro rata accountable for the pool's substantial losses, concluded that it had been fraudulently induced to participate in the pool. Calvert notified American Mutual that it intended to rescind its agreement to participate in the pool. Litigation soon followed in both state court and federal court. A summary of the state and federal actions is set forth in parallel columns.

American Mutual v. *Calvert*	*Calvert* v. *American Mutual*
Circuit Court of Cook County, Illinois	**United States District Court for the Northern District of Illinois**
July 3, 1974	
American Mutual [individually and for the use of the other 98 insurance companies in the reinsurance pool] sued Calvert, seeking a declaratory judgment that the pool arrangement was in full force and effect.[2]	

[1] Additions are listed in brackets; deletions are not indicated.

[2] The complaint without exhibits appears as Appendix 3 to the Petition for Certiorari.

Calvert filed an answer alleging that the agreement was void because American Mutual violated [Section 5 of] the 1933 Securities Act, [Rule 10b-5 promulgated under] the 1934 Securities Exchange Act, the Illinois Securities Law, the Maryland Securities Law, and was guilty of common law fraud.

With its answer Calvert filed a counterclaim seeking $2,000,000 monetary damages, asserting as grounds for such relief all of the defenses asserted in its answer except the alleged violations of Rule 10b-5 of the Securities Exchange Act.[3]

January 10, 1975

Calvert sued American Mutual, seeking rescission of the pool agreement on the same grounds [state and federal] as those listed in its state court answer and $2,000,000 monetary damages on the same grounds as those listed in its state court counterclaim as well as [damages] for alleged violations of Rule 10b-5 of the Securities Exchange Act.[4]

Judge Will stayed proceedings in the case before him pending the outcome of the state proceedings listed above. The court of appeals issued a writ of mandamus compelling him "to proceed immediately with [the] claim for damages and equitable relief under the Securities Exchange Act of 1934."

Judge Will's Opinion

On May 6, 1975 Judge Will issued the memorandum opinion and order at issue here. The order stayed proceedings

[3] The answer and counterclaim appear as Appendix 4 to the Petition for Certiorari.

[4] The federal complaint without exhibits appears as Appendix 5 to the Petition for Certiorari.

in the federal court on all claims alleged in Calvert's complaint, except the claim for money damages under Rule 10b-5 of the Securities Exchange Act of 1934. The opinion and order appear as Appendix 2 to the Petition for Certiorari. The result has been to postpone all adjudication in federal court pending the outcome of the state proceedings.

Judge Will's May 6, 1975 opinion is a careful exposition of the applicable standards governing a decision to stay and a detailed analysis of the reasons why a stay should be issued in the present case.

Judge Will, in the exercise of his judicial discretion, determined that retaining jurisdiction over Calvert's federal claims, but awaiting further developments in the state litigation before rendering a decision, was appropriate and that "in order to avoid unnecessary waste of time and expense to both the litigants and the court, and to further the harmonious and efficient administration of justice, the federal cause of action should be stayed to the extent that it is duplicative."

He continued: "The state court action, involving the same parties and general issues, was filed six months prior to the institution of the instant suit. It has already progressed through the threshold pretrial stages and has had the benefit of some discovery. The state court has set July 7, 1975 as a tentative trial date, which is considerably earlier than this court, in the normal course of trial preparation, could conceivably try the case. Moreover, the scope of the state court action is broader than the instant action, embracing not only all of the issues raised by Calvert in the instant suit with the exception of the 1934 Act monetary damages question, but it also includes those issues underlying [American Mutual's] declaratory judgment action which are not present here. Accepting the fact that the

state court has jurisdiction over all issues before it and all of the issues presented here except the 1934 Act damages claim are before it, that it has a six month headstart on this court, and that a tentative trial date has already been set, it makes little sense for this court to simultaneously engage in resolution of exactly the same questions of law and fact. Consistent with the Seventh Circuit's holding in *Aetna* [*State Bank* v. *Altheimer,* 430 F.2d 750 (7th Cir. 1970)], we find that Calvert's federal suit should be stayed pending disposition of the state court suit."

Judge Will also noted the need to avoid an "unseemly race to judgment with its concomitant harrassment and confusion." He concluded: "To avoid unnecessary duplication of effort and expense, we will stay here all aspects of Calvert's federal action which are pending before both courts."

He further noted: "While it is not determinative, it should be noted that Calvert, as a non-resident defendant in the state court action, apparently could have removed that action to this court and thereby resolved all of the problems of duplication of effort, etc. It chose not to do so and now seeks both to assert its defenses and counterclaim in the state court and raise the same issues here."

After attempts to secure reconsideration, Calvert petitioned the United States Court of Appeals for the Seventh Circuit for a writ of mandamus.

Opinion of the Court Below

Mandamus was granted by the court of appeals, relying exclusively on this Court's opinion in *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800 (1976). The court of appeals made clear that Judge Will's action had been entirely "correct" under existing Seventh Circuit law as stated in *Aetna State Bank* v. *Altheimer,* 430 F.2d 750 (7th Cir. 1970), but held that the discretionary doctrine of *Aetna* had been overruled by *Colorado River.*

The opinion below states:

> "The question before us is whether a federal court in a pending suit may await the outcome of a state court action between the same parties in which all but one of the issues are identical, that one issue being a claim for damages over which the federal court has exclusive jurisdiction." 560 F.2d at 793.[5]

The court stated that under the existing Seventh Circuit rule of *Aetna State Bank* v. *Altheimer, supra,* which recognized "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants," 430 F.2d at 755, Judge Will's stay order "was correct at the time it was entered," in May 1975. 560 F.2d at 795.

The court of appeals held, however, that the subsequent decision of this Court in *Colorado River Water Conservation District* v. *United States, supra,* overruled the *Aetna State Bank* case, eliminated the power of a district court to control its docket, and compelled the district court to undertake immediately its "obligation to exercise its jurisdiction." 560 F.2d at 795-97.

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[5] The sole difference between the claims in the state court and the federal court relates to the allegations concerning Rule 10b-5 under the Securities Exchange Act of 1934.

In the state court, fraudulent representations in violation of Rule 10b-5 are alleged as a defense to the complaint, but no affirmative damages for violation of Rule 10b-5 are claimed. Instead, a two million dollar counterclaim for damages is based exclusively on supposed violations of other state and federal laws. In the federal court, a claim for two million dollars in damages is also alleged, based upon violation of Rule 10b-5 in addition to the other state and federal grounds alleged as bases for the two million dollars damages in the state court.

Accordingly, all issues relating to liability, including Rule 10b-5, are presented in the state court action, the only issue presented exclusively in the federal court being the extent of damages in the event liability under Rule 10b-5 is found to exist.

On the basis of this view, the court of appeals panel granted a writ of mandamus and ordered Judge Will as noted "to proceed immediately with [the] claim for damages and equitable relief under the Securities Exchange Act of 1934." *Id.* at 797.

Four of the eight active judges on the court of appeals indicated a desire to have the matter submitted to the court *en banc*. Their views are set forth in note 5 to the opinion below. They said: "In simple terms, the panel's opinion holds that the rationale developed in *Aetna* [*State Bank* v. *Altheimer*] can no longer stand in the light of *Colorado River*. . . ." They stated: "the panel has apparently taken from the district court the *power* to stay proceedings as 'incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel and for litigants,' " a power these four judges believed to be based on this Court's opinion in *Landis* v. *North American Co.*, 299 U.S. 248 (1936). They regarded the rule of *Landis* and *Aetna* which the panel was abandoning as "a salutary rationale in the context of the overburdened federal courts." 560 F.2d at 796 n.5.

By granting the writ of mandamus, the panel held that the district court had a clear legal duty to proceed regardless of the pendency of the state proceeding, and accordingly had no discretion in the matter. For it is plain that mandamus as an extraordinary remedy will not lie with respect to the exercise of discretion, but only where the duty is not subject to discretion. It is available only in "exceptional circumstances amounting to a judicial 'usurpation of power.' " *Will* v. *United States*, 389 U.S. 90, 95 (1967).

Thus, the sole issue raised is whether a United States district judge has *any* discretion to stay proceedings in his court when the identical parties are litigating essentially the identical issues in a previously pending case in a state court. As noted, the court of appeals agreed that, if Judge Will had any

discretion over his calendar his decision to stay proceedings was "correct." Nevertheless, following what it believed to be the implications of this Court's decision in *Colorado River Water Conservation District* v. *United States*, *supra*, the court below denied him any discretion and granted a writ of mandamus to compel him to reorder his calendar and immediately decide issues that otherwise might well become moot as a result of the pending state court litigation.[6]

A petition for certiorari was timely filed and was granted by this Court on January 9, 1978.

SUMMARY OF ARGUMENT

It has been recognized since *Landis* v. *North American Co.*, 299 U.S. 248, 254-55 (1936), that district judges possess broad discretion to stay duplicative litigation in the interest of judicial efficiency. The court below held that under the standard of *Landis*, Judge Will exercised his discretion "correctly."

For it was plain that it would be a great waste of judicial and litigants time to have both state and federal courts simultaneously neously processing identical issues of fact and law between the same parties.

However, the court below held that the discretion recognized in *Landis* had been removed by *Colorado River Water*

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[6] Following the Seventh Circuit decision, the defendant-respondent American Mutual determined not to petition for certiorari. Judge Will was convinced that, independent of the private interest of any litigant before him, the Seventh Circuit's decision imposed intolerable burdens on the federal judicial system, and he considered review by this Court to be vital. He therefore requested the Department of Justice to file a petition for certiorari on his behalf, but the Solicitor General's office declined on the grounds of a general policy not to represent judges in mandamus proceedings in private actions as opposed to government cases. Accordingly, to protect himself and other federal judges deprived by the decision below of control over their calendars, he retained private counsel for that purpose, as suggested by the Solicitor General's office.

Conservation District v. *United States*, 424 U.S. 800 (1976). This conclusion is clearly wrong. For, instead of rejecting discretion of lower courts in the interest of judicial economy and avoidance of wasteful and duplicative litigation, this Court in *Colorado River* reached its decision in part on the basis of the importance of avoiding piecemeal litigation. It cited *Landis* with approval in this regard. 424 U.S. at 819. Further, *Colorado River* concerned the dismissal of a federal suit in deference to state proceedings, not a mere temporary stay. And the result in *Colorado River* was to *uphold* the dismissal as justified in the interest of "wise judicial administration."

Plainly, *Colorado River* did not purport to make any general change in existing doctrine. Instead, the case was concerned with determining congressional intent in a particular statute, the McCarran Amendment. In that context it dealt with issues of federalism and special considerations respecting water rights that are simply irrelevant to the instant proceedings. *Colorado River* cannot be regarded as overruling *Landis* v. *North American Co.*, a case the *Colorado River* Court twice cited favorably as authority.

Significantly, the court below misconstrued Judge Will's opinion, concluding that his stay order was the functional equivalent of a dismissal. To the contrary, Judge Will made clear that Calvert's claim remained viable, and that he would resolve all the issues presented at the appropriate time.

In addition, the court below misinterpreted *Colorado River* by failing to recognize two significant elements. First, the court below ignored the explicit evidence that *Colorado River* set standards only for dismissals of federal litigation, not for stays. The consequences of a dismissal, a final refusal to exercise jurisdiction, may be much more serious and, accordingly, a much more severe standard is appropriate. Second, *Colorado River* established that district judges have some discretion over dismissals. Thus *Colorado River* implies that the kind of clear legal duty necessary for mandamus relief is not present.

Indeed, to the extent that *Colorado River* teaches anything about the instant case, it supports Judge Will. The *Colorado River* Court expressly extended the principle of *Landis* to uphold the dismissal of litigation in the interest of unifying proceedings before a single court.

ARGUMENT

I. INTRODUCTION

A. The Issue in the Case

In 1936 this Court determined in *Landis* v. *North American Co.*, 299 U.S. 248, 254-55 (1936), that

> "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance."

Landis has never been questioned by this Court, and was recently cited with approval in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 817, 819 (1976).

The principle of *Landis*, that federal district judges possess inherent power to stay duplicative litigation in the interest of judicial efficiency, was quoted at length and applied by the Seventh Circuit in upholding a stay in *Aetna State Bank* v. *Altheimer*, 430 F.2d 750, 755 (7th Cir. 1970), a case conceded by the court below to be indistinguishable from the instant litigation, *see* 560 F.2d at 795 ("the factual parallelism between [the instant case and *Aetna*] is overwhelming"). Following the rule of *Landis* and *Aetna*, the court below found that Judge Will had exercised his discretion "correctly" in granting a stay.

However, the panel below held that this Court's decision in *Colorado River Water Conservation District* v. *United States*,

supra, effectively overruled the principle of the district court's discretion taught by *Landis* v. *North American Co.*, thereby compelling the court of appeals to overrule *Aetna*.

The sole issue presented by the instant case, therefore, is whether *Colorado River* took away the discretion of district judges recognized by *Landis* to stay duplicative litigation. As will be demonstrated below, *Colorado River* did not overrule *Landis;* it extended *Landis* to permit the avoidance of duplicative and wasteful litigation in cases not covered by *Landis*. The decision below is clearly erroneous, resulting from the panel's misunderstanding of both Judge Will's stay order, and the holding of *Colorado River*.

B. This Court's *Colorado River* Decision

In *Colorado River*, the United States had brought suit in federal court in its own behalf and on behalf of Indian tribes, seeking a declaration of water rights in the Colorado watershed. The district court dismissed the action, stating that the doctrine of abstention required deference to a comprehensive adjudication of water rights pending in a Colorado state court. 424 U.S. at 806. It was noted that federal policy as embodied in the McCarran Amendment, 43 U.S.C. § 666, opposed piecemeal adjudication of water rights, that the federal government was already involved in a number of other Colorado state water rights adjudications, that no substantive proceedings had taken place in federal court, and that the federal courthouse was 300 miles from the water sources at issue. 424 U.S. at 820.

This Court held that the district court had acted properly in dismissing the federal action as a result of the balancing of a number of factors: While there is a "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *id.* at 817, dismissal is appropriate in "exceptional circumstances." The Court concluded that:

> "In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a

> federal court may also consider such factors as the inconvenience of the federal forum, cf. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947); the desirability of avoiding piecemeal litigation, cf. *Brillhart* v. *Excess Ins. Co.*, 316 U.S. 491, 495 (1942); and the order in which jurisdiction was obtained by the concurrent forums, *Pacific Live Stock Co.* v. *Oregon Water Bd.*, 241 U.S. 440, 447 (1916). No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required. See *Landis* v. *North American Co., supra*, at 254-255. Only the clearest of justifications will warrant dismissal." 424 U.S. at 818-19.

All the justices accepted this standard; the majority held that a balancing of these factors favored dismissing the federal court litigation, while three dissenters felt that the prerogative of district courts to dismiss actions should be more limited. No question was raised and no consideration was given by any of the justices, majority or minority, to the power of district judges to control the calendar of cases, and to stay federal proceedings without dismissing the case. Accordingly, no express statement was made concerning the rights of district courts to exercise the inherent right to control their calendars in the interests of judicial economy and avoidance of duplicative litigation, where no order of dismissal is entered and jurisdiction is retained. However, *Landis* v. *North American Co.* was cited with approval.

The panel below, however, stated that it saw no distinction between a stay and a dismissal. Applying the high standards required for dismissal by *Colorado River, i.e.*, exceptional circumstances, the panel below held that the standards had not been met and that no right to dismiss existed; therefore in its view no stay was permissible, the discretion to stay being limited to situations where dismissal was appropriate.

The *Colorado River* case having come before the appellate courts by appeal from a dismissal, no question either of the power to stay or of the use of the extraordinary writ of mandamus was involved, and there was no occasion for any discussion of those subjects.

As noted above, the *Colorado River* decision did not compel a district court to exercise jurisdiction. Instead, it sanctioned a district court's refusal to exercise jurisdiction because of a number of factors associated with "wise judicial administration." While most of the issues addressed in *Colorado River*, questions of federalism and the special nature of water rights, are unrelated to the issues presented by the instant case, *Colorado River* did address itself in part to the importance of judicial efficiency and the wastefulness of duplicative and piecemeal litigation. And in addressing these latter issues, the *Colorado River* decision's emphasis on the desirability of unifying litigation in one forum is strikingly similar in tone to Judge Will's opinion, and in marked contrast to the opinion of the court below.

It is therefore surprising that the panel below found its decision even reconcilable with *Colorado River*, much less compelled by it. In Part II below, it will be demonstrated that the panel's conclusion that *Colorado River* was direct precedent compelling the decision below resulted because the panel first confused Judge Will's stay order with an order of dismissal, and second misinterpreted the *Colorado River* holding by failing to recognize (1) that *Colorado River* expressly applied only to final dismissals, not to stays, (2) that *Colorado River* does not indicate that a clear legal duty, necessary for the grant of mandamus relief, is present, and (3) that *Colorado River* was primarily concerned with issues of federalism that are irrelevant to the instant case. In Part III, it will be shown that to the extent *Colorado River* teaches anything about the instant case, it supports Judge Will.

II. THE DECISION BELOW WAS NOT REQUIRED BY *COLORADO RIVER*

A. The Court Below Fundamentally Confused Judge Will's Stay Order With an Order of Dismissal

The opinion below stated:

> "The instant case differs from *Colorado River* in that the district court did not dismiss Calvert's federal action. Instead, it stayed[4] all but the claim for damages under Rule 10b-5, over which it retained jurisdiction but refused to decide. We do not find this distinction to be important. It is clear that the district court, acting properly under *Aetna*, intended to defer on grounds of federalism to the results reached in the state proceedings. Thus, the effect of the district court's order was to preclude federal resolution of Calvert's federal claims, making the order equivalent to a dismissal for purposes of this case.
>
> "[4] The district court granted American Mutual's motion to 'abate,' but stated specifically that it was staying all but the Rule 10b-5 damages claim. In *Aetna*, we defined abatement 'as being the overthrow of an action which defeats the action for the present but does not debar the plaintiff from commencing it in a better way.' 430 F.2d at 854. We assume that Judge Will meant to use 'stay' as a synonym for 'abate.'"
>
> 560 F.2d at 795-96 & n.4.

This passage reveals at least three fundamental errors. First, nothing in Judge Will's memorandum opinion supports the panel's "assumption" that he used "stay" as a synonym for "abate." To the contrary, Judge Will made very clear that Calvert's Rule 10b-5 claim was "a viable claim in [his] court." Calvert's claim has not been overthrown: The federal court has retained jurisdiction, but adjudication has simply been temporarily delayed.

Second, in the above-quoted passage the court below found it "clear" that Judge Will "intended to defer . . . to the results reached in the state proceedings." Again, it is the exact opposite that is clear. Judge Will intended at the time of his May 6, 1975 memorandum opinion, and intends today, to reach his own decision on Calvert's claims, the claim for damages under Rule 10b-5 and the other counts in Calvert's complaint, at the appropriate time, taking into account the then existing situation. Far from automatically deferring to the state court, he will make a determination reviewable in the court of appeals and this Court, of the proper effect to be given to the outcome of the state proceedings. The court below itself correctly stated that the applicability of doctrines such as res judicata and collateral estoppel has not yet been determined and therefore cannot yet be at issue. *See* 560 F.2d at 797.

Third, the court below construed Judge Will's actions to be based "on grounds of federalism." This is not true. Federalism was not at issue in *Landis* v. *North American Co.*, and is not at issue here. Judge Will stayed the proceedings in his court in the interest of judicial economy and efficiency in litigation, not because the issues were more properly presented to a state forum, or because a federal forum would interfere with the development of state policies. Judge Will's decision would have been identical if the cases had been pending in two federal courts.

In sum, Judge Will's decision involved not a denial of federal jurisdiction, but only a matter of timing of the exercise of jurisdiction assumed to exist. He simply postponed decision of the Rule 10b-5 and the other issues before him because of the substantial possibility that the litigation in his court would become entirely moot as a result of the earlier filed parallel litigation between the same parties being conducted in state court. It was this kind of control over their judicial calendars that was confirmed to district judges in *Landis* v. *North American Co.*

Judge Will expressly retained jurisdiction over all of Calvert's claims, and issued only a temporary stay. Calvert has not been denied its right to a federal forum. If at some point Calvert were no longer able to adjudicate its claims in a timely and efficient manner in the state court, or if at the end of state court litigation, Calvert's Rule 10b-5 claim has not become moot, Judge Will would then decide all issues before him in the light of the then existing posture of the state court proceedings.

In the interim, he would be able to devote his efforts to the claims of other litigants who have no alternate state court case through which to seek identical relief.

B. The Court Below Misinterpreted the Holding of *Colorado River*

Although, as explained above, Judge Will did not dismiss Calvert's federal claims, but merely postponed their resolution in the interest of judicial economy, the court below concluded that *Colorado River* effectively overruled *Landis* v. *North American Co.*, taking away from district judges the discretion to order their calendars in the interest of judicial efficiency. In reaching this surprising conclusion, the court of appeals overlooked at least three critical distinctions between *Colorado River* on the one hand, and the situations presented in *Landis*, *Aetna* and the instant proceedings on the other.

1. *Colorado River* Concerned Final Dismissals, Not Mere Stays

First, and most important, *Colorado River* involved the dismissal of a federal lawsuit in deference to state litigation, not the grant of a mere stay. There is no ambiguity in the *Colorado River* opinion on this point; indeed, the Court could not have made itself any clearer. *See, e.g.*, 424 U.S. at 806 ("We granted certiorari to consider the important questions of whether the McCarran Amendment terminated jurisdiction of federal courts to adjudicate federal water rights and whether, if that jurisdiction was not terminated, the District Court's dismissal in this case was nevertheless appropriate"); *id.* at 813 ("Next we

consider whether the District Court's dismissal was appropriate under the doctrine of abstention. We hold that the dismissal cannot be supported under that doctrine in any of its forms"); *id.* at 819 ("Only the clearest of justifications will warrant dismissal"); *id.* at 820 ("We emphasize, however, that we do not overlook the heavy obligation to exercise jurisdiction. We need not decide, for example, whether, despite the McCarran Amendment, dismissal would be warranted if .... But the opposing factors here, particularly the policy underlying the McCarran Amendment, justify the District Court's dismissal in this particular case") (footnote omitted). The dissenting opinion was even more blunt, characterizing the *Colorado River* holding as "clos[ing] the doors of the federal courthouse." *Id.* at 823 (Stewart, J., dissenting).

Whereas the instant case involves merely timing, *Colorado River* involved jurisdiction. *Colorado River's* extended treatment of the abstention doctrine is sharp illustration. The Court was interested in situations where federal courts should keep out of litigation not temporarily, but finally and for all purposes:

> "It is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. In *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), for example, the Court held that a suit seeking review of the reasonableness under Texas state law of a state commission's permit to drill oil wells should have been dismissed by the District Court. The reasonableness of the permit in that case was not of transcendent importance, but review of reasonableness by the federal courts in that and future cases, where the State had established its own elaborate review system for dealing with the geological complexities of oil and gas fields, would have had an impermissibly disruptive effect on state policy for the management of those fields." 424 U.S. at 814-15.

In such a situation, a mere stay of federal proceedings, with the state adjudication later subjected to scrutiny by the federal judge, could be as disruptive as an immediate federal determination. The holding of *Colorado River* is that in certain cases federal courts should have no jurisdiction to act at all.

The practical distinctions between dismissal of litigation, as discussed in *Colorado River,* and the grant of a stay are highly significant. Dismissal of a federal lawsuit in favor of state litigation, as was permitted by the *Colorado River* Court, may involve serious consequences for the litigants. The federal forum in closing its doors leaves the litigants no recourse if the state proceeding ultimately proves inadequate. No possibility of review in the federal courts of appeals is possible. If Water Division 7 and the Colorado state courts proceeded with unjustifiable slowness or reached results prejudicial to federal claims and defenses, the Indian tribes in *Colorado River* would have no recourse except the possibility of review of the final state court judgment by certiorari in this Court.

This situation is very different, however, when a federal court grants merely a stay. The state litigation remains continually subject on a proper showing to consideration by the federal judge in reviewing his stay order. If it were to appear at any point that Calvert were no longer able to adjudicate its claims in a timely and efficient manner in the state court, the stay could be lifted. And as noted above, if at the end of state court litigation there remained unresolved, unmooted federal claims, Judge Will would then proceed to decide all pending issues.

This jurisdiction by district courts is precisely what litigants are entitled to by the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *Colorado River, supra,* 424 U.S. at 817. On the other hand, to equate stay orders with final dismissals, and conclude, as did the panel below, that the same standard of "exceptional circumstances" should apply to both, is logically untenable. If "exceptional

circumstances" are present, and therefore the case should properly be dismissed, it would be inappropriate for the court merely to stay proceedings in the interest of "judicial economy."

Moreover, as pointed out above, if the *Colorado River* Court had intended to take away the power of district judges to grant stays except in exceptional circumstances, it would have been necessary to overrule *Landis* v. *North American Co.*, which expressly recognized a broad discretion to stay litigation in the interest of judicial economy. Yet *Landis* was never criticized, much less overruled.

2. *Colorado River* Does Not Support the Grant of Mandamus Relief

The second respect in which the court below misunderstood *Colorado River* is a procedural consequence of the significant differences between a stay and a dismissal of a federal action. The *Colorado River* dismissal came before the appellate court on an appeal, where the correctness of the district court's exercise of discretion was at issue. *See* 424 U.S. at 827 (Stevens, J., dissenting) ("even on the Court's assumption that this case should be decided by balancing the factors weighing for and against federal jurisdiction, I believe we should defer to the judgment of the Court of Appeals"). In the instant case, however, Judge Will's stay order came before the Seventh Circuit on a petition for mandamus, where the only issue was whether or not Judge Will had violated a "clear legal duty" concerning which there is no discretion, *see Will* v. *United States*, 389 U.S. 90, 95 (1967). The *Colorado River* opinion recognized a discretionary authority in district judges to dismiss duplicative litigation in "exceptional circumstances": it was on the basis of a weighing of factors that the Court ultimately upheld the dismissal in *Colorado River*. Accordingly, under *Colorado River*, it is doubtful that the kind of clear legal duty necessary for the grant of mandamus relief would be present.

3. *Colorado River* Was Primarily Concerned With Issues of Federalism

The panel's third misperception of *Colorado River* lies in its failure to note that, despite the Court's recognition of considerations of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation," 424 U.S. at 817, most of the analysis in *Colorado River* was devoted to questions of federalism. *Colorado River* did not purport to be a comprehensive analysis of the discretionary power available to district judges to stay litigation in the interest of judicial economy. Rather the issue was the narrow question of whether a particular case over which federal jurisdiction existed, but which seemed to be more properly brought in a state forum, could be dismissed by the federal court.[7] *See, e.g.*, 424 U.S. at 819 ("we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings"). The Court held that, while none of the general abstention doctrines applied to the facts of the case, dismissal was justified by a specific set of "exceptional circumstances," including the McCarran Amendment's recognition of the utility of consolidating water adjudications in state court, the distance of interested parties from the federal courthouse, and the participation by the plaintiff Government in other Colorado state water proceedings.

The *Colorado River* Court emphasized that it intended to set no general precedent. *See* 424 U.S. at 820 & n.26 ("We need not decide, for example, whether, despite the McCarran Amendment, dismissal would be warranted if . . ."). The *Colorado River* decision was an express ruling by the Court shifting from the federal court a particular proceeding as necessary to carry out the congressional purpose underlying the McCarran Amendment.

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[7] Indeed, it should be noted that the *Colorado River* Court approved the federal court's deference to the state proceeding even though the federal case had been filed first.

The opinion shows no evidence of any intent to make any change in existing doctrine applicable outside the context of water rights and the McCarran Amendment, and relied heavily on the congressional policy expressed in that Amendment.

The touchstone of the power of district judges to order their calendars in the interest of judicial economy is thus not *Colorado River,* but remains *Landis* v. *North American Co.* Indeed, it should be noted that the discretion confirmed in *Landis* extends far beyond that exercised by Judge Will. In *Landis,* the Court permitted a district judge to stay proceedings pending the outcome of a case between different parties because that case might clarify a question of law. In no event could the stayed litigation have been rendered moot as a result of the other case. Conversely, the litigants in *Landis* had no alternate court, state or federal, in which to have their claims adjudicated. But in the instant situation, the parties and claims before Judge Will and the state judge are to all intents and purposes identical, and the state court has authority to grant all requested relief, thereby creating a strong possibility that the federal case will ultimately be rendered moot.

When the above points are collectively considered, it is clear that *Colorado River* did not overrule *Landis* v. *North American Co.*, and in no way required the Seventh Circuit to overrule *Aetna*. Indeed, as will be demonstrated below, to the extent that *Colorado River* by analogy has implications for the current litigation, it implies that Judge Will acted properly.

III. THE DECISION BELOW IS INCONSISTENT WITH *COLORADO RIVER*

As the dissenting opinions made clear, the effect of *Colorado River* was not to limit the discretion of federal judges, but to extend it. Prior to *Colorado River*, it had seemed clear that with the exception of the narrow abstention doctrines, it was never proper for a federal court to dismiss a case within its jurisdiction because of the pendency of state court proceedings. In sharp contrast to the broad discretion to control their calendars

confirmed to them in *Landis,* district judges had no discretion whatever to dismiss lawsuits properly brought before them. *See* 424 U.S. at 821 (Stewart, J., dissenting):

> "The Court says that the United States District Court for the District of Colorado clearly had jurisdiction over this lawsuit. I agree. The Court further says that the McCarran Amendment 'in no way diminished' the District Court's jurisdiction. I agree. The Court also says that federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.' I agree. And finally, the Court says that nothing in the abstention doctrine 'in any of its forms' justified the District Court's dismissal of the Government's complaint. I agree. These views would seem to lead ineluctably to the conclusion that the District Court was wrong in dismissing the complaint. Yet the Court holds that the order of dismissal was 'appropriate.' "

Colorado River, however, recognized for the first time discretion to dismiss in a limited number of "exceptional circumstances." The Court specified that this newly-created discretion was an extension of the long-standing rule of *Landis* v. *North American Co.*:

> "In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum, [citation omitted]; the desirability of avoiding piecemeal litigation, [citation omitted]; and the order in which jurisdiction was obtained by the concurrent forums, [citation omitted]. No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required. See *Landis* v.

North American Co., supra, 299 U.S. at 254-255." 424 U.S. at 818-19.

These factors are precisely what Judge Will considered in granting his stay. Therefore, if *Colorado River* suggests anything about the instant case, it suggests that Judge Will's order was correct, but that if he had deemed it appropriate, the far more extreme action of dismissing Calvert's complaint might also have been available to him.

There is one additional factor upon which Judge Will relied in staying Calvert's Rule 10b-5 claim, a factor that may also have influenced the court of appeals' conclusion that Judge Will exercised his discretion "correctly." Because diversity jurisdiction existed, if Calvert had truly desired to have its case litigated in federal court, it could simply have removed American Mutual's declaratory judgment action. Calvert's strategy, however, was to proceed in two courts simultaneously.[8]

The decision below, by encouraging duplicative litigation and denying district judges any power to order their calendars efficiently, is totally inconsistent with *Colorado River*, which expressly extended *Landis* v. *North American Co.* by according district judges additional discretion to cope with wasteful duplicative and piecemeal litigation. Federal claimants are already protected by the retained jurisdiction of federal district courts after granting discretionary stays. The only beneficiaries of the decision below would be those litigants who already have one forum for their defense in the state courts which has not been shown to be inadequate, but who nevertheless have been granted by the Court below the advantage of a second forum.

[8] As noted in our petition there seems to be no interest in pursuing the underlying factual question whether Calvert was or was not misled when it entered the reinsurance pool. On the contrary, the proceedings in the state courts up to the Illinois Supreme Court appear to have concentrated on the issue of whether a security was sold when Calvert joined the reinsurance pool.

Recently, in *General Atomic Co.* v. *Felter*, 98 S. Ct. 76 (1977), this Court reaffirmed summarily that state courts were without power to enjoin "vexatious and harassing" duplicative litigation in federal courts. This Court considered litigants to be protected, however, because "[f]ederal courts are fully capable of preventing their misuse for purposes of harassment." *Id.* at 79. Yet the opinion of the Seventh Circuit in the instant case would deny district courts that capability to control proceedings to prevent harassment and abuse. Indeed, the decision below would increase the likelihood of harassing duplicative litigation by compelling the federal district courts to decide "immediately" issues already being adjudicated in state courts. The obvious consequences to the proper administration of justice are so clearly adverse that reversal is necessary.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed, and the writ of mandamus ordered vacated.

Respectfully submitted,

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